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In the Supreme Court of the United States

JULY, SPECIAL TERM, 1942

IN THE MATTERS OF THE APPLICATIONS OF ERNEST PETER BURGER, HERBERT HANS HAUPT, HEINRICH HARM HEINCK, EDWARD JOHN KERLING, HERMAN OTTO NEUBAUER, RICHARD QUIRIN AND WERNER THIEL FOR WRITS OF HABEAS CORPUS

NOS.

UNITED STATES EX REL., ERNEST PETER BURGER, ET AL., PETITIONERS

v.

BRIG. GEN. ALBERT L. COX, U. S. A., PROVOST MARSHAL OF THE MILITARY DISTRICT OF WASHINGTON, RESPONDENT

BRIEF IN SUPPORT OF PETITIONS FOR WRIT OF HABEAS CORPUS

CASSIUS M. DOWELL, Col., U. S. A.,
KENNETH C. ROYALL, Col., A. U. S.,
Attorneys for Petitioners.

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JURISDICTION

On July 28, 1942, the petitioners presented petitions for Writ of Habeas Corpus to Justice James W. Morris, United States District Judge for the District of Columbia, and in writing asked leave to file such petitions. On said date Justice Morris

denied the application of the petitioners to file said petition. Thereupon these present petitions were filed in this Court on July 29, 1942. Jurisdiction is conferred on this Court by Article III of the Constitution and also by 28 U. S. Code, Sec. 451.

QUESTIONS PRESENTED

1. May the Petitioners (six of whom are alien enemies) maintain this proceeding for Writ of Habeas Corpus?

2. If so, are the Petitioners unlawfully restrained of their liberty?

ORDERS INVOLVED

The case involves the validity of the Order of the President of the United States, dated July 2, 1942, appointing a Military Commission for the trial of the Petitioners, and the Proclamation of the President of the United States of the same date, denying certain persons access to the Courts of the United States.

FACTS

In June, 1942, the petitioners were arrested by Agents of the Federal Bureau of Investigation (hereinafter designated F. B. I.). Some of the petitioners were arrested in New York, the others in Chicago.

At the request of said Agents each petitioner signed a "consent to remain under the continuous physical supervision of the Special Agents of F. B. I., Department of Justice, without immediate

arraignment, and at such place as may be designated by the said Agents" (Exhibit G attached to the Petition). Each petitioner also signed a consent for his residence to be searched by the Agents of the F. B. I. (Exhibit F).

Each petitioner also signed a waiver of "my right to be arraigned before a duly authorized judicial officer or magistrate and my right not to be removed from the said judicial district (in which he was taken into custody), except by virtue of a waiver of removal issued for that purpose." This waiver further provides that each petitioner does "hereby freely consent and agree that I may be forthwith removed by representatives of the Department of Justice in their discretion to any judicial district of the United States, either for the purpose of questioning or for the purpose of being held to answer any criminal charges."

On July 2, 1942, The Honorable Franklin D. Roosevelt, President and Commander in Chief of the Army and Navy, issued an order (Exhibit A) appointing a military commission to "try for offenses against the Law of War and the Articles of War" the petitioners and one other person. This order contained the following provision:

> "The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of Military Commissions under the Articles of War, as it shall deem necessary for a full and fair

trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the Members of the Commission present shall be necessary for a conviction or sentence. The record of the trial including any judgment or sentence shall be transmitted directly to me for my action thereon."

The above order provided that "The prosecution shall be conducted by the Attorney General and the Judge Advocate General," and further provided that the Commission should "meet in Washington, D. C., on July 8, 1942, or as soon thereafter as is practicable."

On July 3, 1942, Hon. Francis Biddle, Attorney General of the United States, directed a memorandum (Exhibit C) to Mr. J. Edgar Hoover, Director of F. B. I., to "turn over the custody and control" of the petitioners to the Secretary of War. On the same date, the Secretary of War through The Adjutant General issued a memorandum (Exhibit D) to the Provost Marshal, Military District of Washington, the respondent herein, directing him to "receive and keep in custody" until further orders from the F. B. I., Department of Justice, the petitioners, "prisoners to be tried before a military commission."

On July 3, 1942, Col. F. Granville Munson, of the Judge Advocate General's Department, signed

certain charges (Exhibit E) against the petitioners and one other person, which charges may be summarized as follows:

Charge I: Violation of the Law of War

Specifications 1. In that, during the month of June 1942, Edward John Kerling (and others) being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States, along the Atlantic Coast, and went behind such lines and defenses in civilian dress within zones of military operations and elsewhere, for the purpose of committing acts of sabotage, espionage, and other hostile acts, and, in particular, to destroy certain war industries, war utilities, and war materials within the United States.

Specification 2. In that, during the month of June 1942, Edward John Kerling (and others), being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, appeared, contrary to the law of war, behind the military and naval defenses and lines of the United States, within the zones of military operations and elsewhere, for the purpose of committing or attempting to commit sabotage, espionage, and other hostile acts, without being in the uniform

of the armed forces of the German Reich, and planned and attempted to destroy and sabotage war industries, war utilities, and war materials within the United States, and assembled together within the United States explosives, money, and other supplies in order to accomplish said purposes.

Charge II: Violation of the 81st Article of War

Specification: In that, during the month of June, 1942, Edward John Kerling (and others), being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, and without being in the uniform of the armed forces of that nation, relieved or attempted to relieve enemies of the United States with arms, ammunition, supplies, money and other things, and knowingly harbored, protected and held correspondence with and gave intelligence to enemies of the United States by entering the territorial limits of the United States, in the company of other enemies of the United States, with explosives, money and other supplies with which they relieved each other and relieved the German Reich, for the purpose of destroying and sabotaging war industries, transportation facilities or war materials of the United States, and by harboring, communicating with, and giving intelligence to each other and to other enemies of the United States in the course of such activities.

Charge III: Violation of the 82nd Article of War

Specification: In that, during the month of June 1942, Edward John Kerling (and others), being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, were, in time of war, found lurking or acting as spies in or about the fortifications, posts, and encampments of the armies of the United States and elsewhere, and secretly and covertly passed through the military and naval lines and defenses of the United States, along the Atlantic Coast, and went about, through, and behind said lines and defenses and about the fortifications, posts, and encampments of the armies of the United States, in zones of military operations and elsewhere, disguised in civilian clothes and under false names, for the purpose of committing sabotage and other hostile acts against the United States, and for the purpose of communicating intelligence relating to such sabotage and other hostile acts to each other, to the German Reich, and to other enemies of the United States, during the course of such activities and thereafter.

Charge IV: Conspiracy to Commit All of the Above Acts

Specification: In that, during the year 1942 Edward John Kerling (and others), being enemies of the United States and acting for and on behalf of the German

Reich, a belligerent enemy nation, did plot, plan, and conspire with each other, with the German Reich, and with other enemies of the United States, to commit each and every one of the above-enumerated charges and specifications.

The response herein makes certain statements as to the acts committed by the petitioners. It, therefore, becomes necessary for petitioners to summarize briefly certain salient facts relative to their conduct prior to arrest.

The petitioners attended a school near Berlin and received instructions and directions as to industrial sabotage of manufacturing and transportation facilities. They were directed to commit no sabotage within ninety days after their arrival in America. They received no instructions or directions relative to obtaining information of a military nature or communicating the same to Germany. They were expressly directed to go unarmed and not to kill or injure any individual.

They came to America on submarines and landed in two groups on the Long Island and the Florida coasts. They brought certain explosives which they buried on the sea shore. At the time of their arrest, they had committed no acts of sabotage, had taken no steps toward sabotage and had made no definite plans as to time and place of committing any sabotage.

The petitioners testified they did not intend to commit any acts of sabotage. In the case of two or more petitioners this testimony was definitely corroborated by other evidence produced by the prosecution. All of the petitioners deny their guilt.

The full evidence on the various Charges and Specifications and the full evidence as to the citizenship of the various petitioners appear in the Record of the alleged Commission. The petitioners will refer to this Record in the Brief and Argument to substantiate their position.

Colonel Cassius M. Dowell and Colonel Kenneth C. Royall, who were named in the President's Order as Counsel for the defendants (petitioners herein), reported for duty on the night of July 3. Upon investigation of the President's Order and Proclamation, and of the Charges and Specifications, Counsel reached the conclusion that there was a serious question as to the constitutionality and validity of the Order and Proclamation. For several days Counsel unsuccessfully sought to obtain a clarification of their Orders in the matter of their right to file a petition for a Writ of Habeas Corpus.

Such efforts, together with the interview of the prisoners and the preparation for the hearing (scheduled to begin July 8) made it impossible for petitioners' Counsel to file any petition for

Writ of Habeas Corpus before the hearing started. It is believed that Counsel for respondent will not question these facts.

When the Commission met on July 8, and before the organization thereof was completed, and before Col. Dowell and Col. Royall took any action on behalf of the prisoners, said Counsel stated (Exhibit I) to the persons named as members of the Commission that in their opinion the Order of the President creating the Commission was invalid and unconstitutional and further stated that in appearing before the Commission, Counsel did not waive any of the rights of the prisoners.

Civil courts were at that time open and functioning normally in the District of Columbia where the alleged Military Commission was assuming to act, and civil courts, both Federal and State, were at that time open and functioning normally in the states of New York and Florida, where the prisoners were charged to have committed offenses and also in each State in which any of the prisoners were arrested or detained.

The trial before the alleged Military Commission continued from July 8 through July 27, on which latter date the evidence of prosecution and defense had all been introduced and the case had been closed except for argument of counsel and action of the alleged Military Commission and of the President. It has been stipulated by Counsel

that this Court may consider the facts up to the date of this hearing and any part of the Record before the alleged Military Commission may be used as evidence in this present hearing.

Before the alleged Military Commission, the defendants (petitioners) duly requested the right to exercise one peremptory challenge, it being the intention of the defendants to challenge a specific member of the Commission. The Commission denied this right, as appears in the stipulation of the parties.

During the early part of the hearing, the Commission called attention to the provision of the President's Order to the effect that there should be admitted such evidence "as would, in the opinion of the President of the Commission, have probative value to a reasonable man." During the presentation of the prosecution's case, over objection, the Commission admitted, as against all defendants, the separate confessions of each defendant made after their apprehension. Such confessions were admitted not only on the charge of conspiracy but also on all the other charges. The Commission has formally announced that neither their findings nor their sentences nor the vote by which the sentences and findings have been determined, will be made public or will be made available to the petitioners until after submission of the matter to the President and after final action by the President.

ARGUMENT

The petitioners submit to the Court the following five propositions, to wit:

First, the petitioners, including the aliens, are entitled to maintain this present proceeding.

Second, the President's Proclamation, which assumes to deny the right of the petitioners to maintain this proceeding, is unconstitutional and invalid.

Third, the President's Order, which assumes to appoint the alleged Military Commission, is unconstitutional and invalid.

Fourth, the President's Order, relating to the alleged Military Commission, is contrary to statute and, therefore, illegal and invalid.

Fifth, the petitioners are entitled to be tried by the civil courts for any offenses which they may have committed.

The argument in support of these five propositions is presented under the ten headings set out below.

I

CITIZENSHIP OF HAUPT

Admittedly all the petitioners are citizens of the German Reich except the petitioner Haupt. Haupt came to the United States when he was five years of age; and during his minority his parents became naturalized. The petitioner Haupt contends that his citizenship, thus acquired, has not been lost in any manner. On the contrary Re-

spondent contends that Haupt has lost his citizenship. The evidence relative thereto is included in the stipulation which is a part of the record.

It will be noted that practically the sole evidence is Haupt's own statement on the stand or in his confession. From these statements it appears that in 1941, at the age of 21, Haupt left America intending to take a trip to Mexico and Nicaragua; that he went to Japan when his money ran low in Mexico; that, while he was issued what he thought was a "passport" by the German Counsul, the paper issued to him stated that he was an American citizen; that, finding employment unsatisfactory in Japan, he signed as a seaman on a German ship and in doing so stated that he was an American citizen; that he later transferred to a ship that went to Germany; that upon arriving there he was treated and listed as an American citizen; that while in Germany he never renounced his citizenship in writing or otherwise; that as a means of getting back home to his parents, and only for that purpose, he entered the school near Berlin; that the contract which he signed in connection with the school was required before he could return to America and that said contract contained no renunciation of his American citizenship; that the work clothes which he wore on his trip to America were not worn in his capacity as a member of the Germany Army but were a necessary requirement for getting back to America; that at no time did he take any oath of

allegiance to Germany or join the German Army or the Nazi Party or renounce in writing or otherwise his American citizenship; that he had at all times intended to return to America; that upon his return to America he returned to his parents' home, applied for a job and registered for the draft; that he never had any intention to commit a crime against the United States and is not guilty of such crime.

Title 8, U. S. Code, Sections 801–2, deals with the subject of expatriation and provides specifically the means by which a person may lose his citizenship. It seems apparent that the petitioner Haupt has not lost his citizenship in any of the ways covered by the statute. He has not remained in any foreign country for the presumptive period of six months. He has not taken an oath of allegiance to a foreign state. He has not served in the armed forces of a foreign state. He has not accepted employment which can be given only to nationals of a foreign state. He has not voted in an election of a foreign state. He has made no formal renunciation of his nationality. He has not deserted the military forces of the United States. Nor has he been convictim of (or even committed) any of the proscribed offenses against the United States.

Under these circumstances he is entitled to the general and well established presumption that a person temporarily residing in a foreign country

is presumed to retain his American citizenship in the absence of clear evidence to the contrary.

(2 Am. Juris. 558.)

If it be suggested that under the German laws Haupt always remained a German citizen because he was born in Germany, the argument manifestly carries too far. For such an argument would mean that no person born in Germany and naturalized in the United States would ever be an American citizen even though he continuously remains in this country.

We respectfully submit that the evidence clearly shows Haupt to be an American citizen.

II

RIGHT OF ENEMY ALIENS TO INSTITUTE THESE ACTIONS

While there has been considerable discussion in the courts and by the text writers as to the right of an enemy alien to institute either actions of a civil nature or actions in connection with the enforcement of criminal remedies against them, the best considered opinions and the more logical texts are to the effect that an enemy alien has the same adjective rights in court as does a United States citizen unless there is a statute or valid Executive Proclamation to the contrary. (As hereinafter pointed out, we contend that the Presdential Proclamation in this case is invalid.)

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In considering this matter it is important to make certain distinctions. In the first place there are certain English decisions which assume to limit to "subjects" the rights to enter the courts. We do not believe that in America we have the equivalent of "subjects." If it be deemed synonymous with citizens, it is apparent that the English decisions are not applicable here, as there is no doubt about the right of aliens in general to enforce their legal rights in our Courts.

In the second place, decisions under the Trading With the Enemy Act (50 U. S. Code, Appendix) are not in point. This statute expressly applies only to certain personal rights of alien enemies arising out of commercial transactions or the ownership of property. It does not purport in any way to deprive them of their rights to apply for a writ of habeas corpus. This distinction fully explains the ruling of this Court in the recent case of *Ex Parte Colonna,* 86 Law Ed. 357.

The right of enemy aliens to apply for a writ of habeas corpus seems supported by the following authorities:

Ex parte Milligan, 4 Wall. 2, at pp. 115–121.

55 Harvard Law Review (1942), at p. 1058.

In 55 Harvard Law Review (1942), at page 1058, the writer says:

> "In any event, even if the courts are reluctant to encourage resident enemy aliens in commercial transactions, they should at least protect their bodily security until positive executive action to the contrary. In spite of total war the courts of justice will aid little in the efficient prosecution of the war effort by declaring an open season on a not inconsiderable part of our civilian population."

In Opinion of the Attorney General, Vol. 31, p. 361, in discussing the famous case of Ex parte Milligan (hereinafter fully discussed) it is stated:

> Milligan was a citizen of the U. S. *But the provisions of the Constitution upon which the decision was based are not limited to citizens; they apply to citizens and aliens alike.* [Italics supplied.]

In Kaufman v. Eisenberg, 32 N. Y. S. (2nd) 450 at page 454, the Court says:

> "It is my view that until it is manifested by legislative or presidential pronouncement that the right of a resident alien enemy to sue or prosecute in our courts has been withdrawn, the court must recognize and enforce the right, and this, irrespective of any personal views which the judge may entertain that such a right should be denied to all alien enemies."

In *In re Milligan,* 4 Wall. 2, at page 120, the Court says:

> "The Constitution of the United States is a law for rulers and people, *equally in war and peace,* and covers with the shield of its protection, all classes of men, at all times, and under all circumstances." [Italics supplied.]

In Section VIII of this brief we state fully our reasons for considering the Presidential Proclamation of July 2, 1942, unconstitutional and invalid. This is particularly clear as to the part of the Proclamation denying the right to petition for Writ of Habeas Corpus. Not only is there lack of statutory authority for such action on the part of the Executive; but also the Proclamation is in violation of Article I, Section 9, Clause 2 of the Constitution.

It might be suggested that at least statutory authority for the Proclamation is contained in 50 U. S. Code 21, which provides for the internment of alien enemies, but a careful reading of the statute shows that such is not the case. While certain language of this Statute, if read without reference to the entire Statute, might seem to authorize a very broad Presidential Proclamation as to alien enemies, it is apparent that the power conferred upon the President is only in relation

to the internment for which the Statute provides. It cannot possibly authorize a proclamation which would deny an alien enemy of his right to a Writ of Habeas Corpus.

Ex parte Orozco, 201 Fed. Reporter, p. 106.

As a matter of fact, the Court had held that an enemy alien can resort to Habeas Corpus for the purpose of determining the validity of his internment.

Ex parte Risse, 257 F. 102.

In this case the Court held that the petitioner was an enemy alien and, therefore, had to be interned. It is important, however, to note that, upon a finding that the petitioner was an enemy alien, the Court did not dismiss the case for lack of jurisdiction or on the ground that enemy aliens did not have the rights to enter the Courts, but considered the case upon its merits. Such consideration is consistent only with a holding that an enemy alien can file a petition for Habeas Corpus in our Courts.

We find no decision to the contrary and contend that, upon the authorities above cited, as well as upon principles of fairness and justice, the petitioners have a right to raise by Habeas Corpus the question of the validity of their detention.

III.

JURISDICTION OF A MILITARY COMMISSION OVER OFFENSES CHARGED

We will later discuss the manner in which the Order appointing the Military Commission violated express statutory provisions. The petitioners contend that, even if this were not the case, there is nothing in the charges against the petitioners which would justify the President's appointment of a Military Commission. We further contend that there are no facts or conditions which would support any charges that would justify the appointment of such a Commission. These contentions will be discussed in connection with each of the various charges.

A. Spy Charge

U. S. Code 1343 and Article of War 82 are in practically identical language, as follows:

> "ART. 82. *Spies.*—Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death."

It will be noted that these provisions vest exclusively in a Court-Martial or Military Commission the right to try the charge of spying.

Amendment 5 to the Constitution of the United States provides that "no person shall be held to answer for a capital, or otherwise infamous, crime unless on the presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces,* or in the militia, when in actual service in time of war or public danger." [Italics supplied.] Article 1, Section 8 of the Constitution, provides in Clause 14, that Congress shall have power "to make rules for the government and regulation of the *land and naval forces.*" [Italics supplied.]

U. S. Code 1343 and Articles of War 82 are valid only if they come within the language of the above sections of the Constitution.

It is well settled that under such circumstances the statutes must, if possible, be construed in a manner consistent with the Constitutional provisions. We submit, therefore, that Articles of War 82 (and U. S. Code 1343) necessarily applies only to offenses committed in connection with actual military operations or on or near military fortifications, encampments, or installations. Otherwise the offenses do not arise in the land and naval forces.

This view is fully supported by eminent authorities:

Winthrop on Military Law, 841.
31 Opinion of Attorney General, p. 356.
Willoughby on Constitutional Law, p. 1548, Sec. 1014.
Rules of Land Warfare, par. 7, page 3.

In connection with this feature of the case attention is called to the fact that Article of War 82 requires the offense to be committed "in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, *or elsewhere.*" [Italics supplied.] While the word "elsewhere" has been given conflicting construction, Rules of Land Warfare, issued by the War Department in 1940, contains the following language (Paragraph 204, pages 58 and 59):

> "The Hague definition applies only where the information is obtained or sought 'in the zone of operations,' while the statutory definition is not so limited. The latter, however, includes only persons 'found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere,' and the phrase 'or elsewhere' as here employed, has been held not to justify trial by military tribunals of 'persons charged with acts or offenses committed outside of the field of military operations or territory under martial law or

other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces, such as camp followers.' (Ops. Atty. Gen. U. S., Vol. 31, pp. 356, 361). Persons charged with espionage committed in the United States, outside military jurisdiction, are nevertheless liable to trial and punishment by the civil courts under the espionage laws (United States Code, Title 50, Ch. IV)."

In addition to the requisite that spying under Article 82 must be in or about military installations, there are other requisites of the charge of spying.

Article of War 82 merely uses the words "lurking or acting as a spy" without further definition of spying. The Hague Convention of 1907 provides that "A person can only be considered a spy when acting clandestinely or on false pretenses, *he obtains or endeavors to obtain information in the zone of operations of the belligerent with intention of communicating it to the hostile party.*" [Italics supplied.]

This definition is carried forward in Section 202 of the Rules of Land Warfare and has been approved as a correct definition of spying by established texts:

Wheaton, Int. Law, 6th Ed., Vol. 2, p. 764.

Oppenheim, Int. Law, 1905 Ed., Vol. 2, p. 60.

Furthermore, it is substantially carried forward in Paragraph 142, page 157, Court-Martial Manual (which discusses Article of War 82); and it is there directed that the proof required for spying must include evidence *"that he was obtaining or endeavoring to obtain information* with intent to communicate the same to the enemy." [Italics supplied.]

It is true that Paragraph 209 of Rules of Land Warfare, and Paragraph 142 of the Court-Martial Manual provide that it is not essential to prove that the accused obtained the information sought or that he communicated it. However, this does not purport to dispense with the necessity that there must be either some obtaining of information or some actual endeavor to obtain the same.

It appears, therefore, that the offense of spying is not committed in the absence of any of the following four specific elements, to wit: (1) That the alleged offense was committed in the zone of military operations (as defined above), (2) that the accused at least *endeavored* to obtain information, (3) that the accused intended to obtain such information and communicate it to the enemy, (4) that the information itself must be material information of a military nature. The word "endeavor" connotes a serious attempt and earnest effort to accomplish a designated object, and paragraph 152, at page 190, Manual for Courts-

Martial, lays down the rule that "mere *preparation* to do a criminal act" [italics supplied] does not constitute an *attempt* to commit a crime. The mere proof that persons in uniform landed on the American coast from a submarine, or otherwise, does not supply any of these elements.

The specification under the charge of spying (Charge III in Exhibit E) entirely fails to allege any endeavor to obtain military information; and it is our contention that, therefore, no offense of spying is charged and that for this reason (as well as others) a military commission cannot be validly appointed to try this charge and cannot try the same. We further contend that there are no *facts* to show any endeavor to obtain military information or any intent to obtain it or communicate it to the enemy.

On account of the provisions relating to secrecy of the trial before the alleged Commission, counsel for the petitioners do not refer in this brief to the testimony on the charge of spying but ask permission to furnish to this Court at the hearing a summary of the evidence on "spying" as disclosed in the certified record before the alleged Commission.

Attention, however, is here called to the fact that none of the petitioners committed any acts on, near, or in connection with any fortifications, posts, quarters, or encampments of the Army, or on, near, or in connection with any other military installations, or at any location within the zone

of operations. This feature of the matter is further and more fully discussed under Section IV of this brief.

It seems apparent that with a correct construction of Article of War 82, that is, a construction consistent with the Constitution of the United States, the defendants have not been guilty of the charge of spying.

The André case has at times been cited as authority against the position here urged by the petitioners. However, the consensus of opinion is that this case was improperly decided and was the result of intense feeling arising out of the prominence and publicity of the Benedict Arnold episode.

Wheaton, International Law, 6th Ed., Vol. 2, page 766,

Oppenheim, International Law, 1905 Ed., Vol. 2, page 161,

Halleck, International Law, 3d Ed., page 573.

The question may be raised that this Court cannot pass upon the sufficiency or insufficiency of evidence to prove the commission of an offense. However, we think that the authority of a Military Commission to act under Article of War 82 is dependent upon an offense of spying being committed, and is certainly dependent upon some act being committed within the zone of military operations as defined by Article 82. In the absence of evidence to show any acts within

this zone, there is no authority for a Military Commission under Article of War 82.

B. Alleged Violation of Article of War 81

Article of War 81 reads as follows:

> "Art. 81. RELIEVING, CORRESPONDING WITH, OR AIDING THE ENEMY.—Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court martial or military commission may direct."

As in the case of Article of War 82, it is expressly provided that trial may be by a Military Commission. The fact that the acts alleged to have been committed by the petitioners were not in the zone of military operations would also preclude the jurisdiction of a Military Commission to try this offense.

In fact, just as in the case of spying, the situation under Article of War 81 is more favorable to the petitioners because the offense sought to be described therein is also in violation of specific criminal statutes of the United States, to wit: 18 U. S. Code, Section 1, 50 U. S. Code, Section 31–42, 50 U. S. Code, Section 101–106. This differentiates the case from the charge of spying in the zone of military operations.

(It may be appropriate at this point to call attention to the difference between spying as used in the Article of War 82 and espionage, as defined in our statutes. The latter offense is the giving of information to the enemy where such crime is committed outside of the zone of operations. Rules of Land Warfare, Sec. 204, p. 58. Compare Wheaton, International Law, 6th Ed. Vol. 2, page 764.)

In the instant case the petitioners were arrested by the civil authorities, waived arraignment before a civil court and also waived removal to another Federal judicial district (Exhibits G and H attached to petition). The civil courts thereby acquired jurisdiction; and there was no authority for the military authorities to oust these courts of this jurisdiction.

C. Violation of the Law of War

The first charge against the petitioners is violation of the Law of War. We have been unable to find in the published Rules of Land Warfare any such offense as is described in the specifications of the first Charge. These Rules of Land Warfare were prepared in 1940 under the direction of the Judge Advocate General and purport to include all offenses against the Law of War.

Furthermore, the alleged Law of War which is asserted by the prosecution is a species of international law analogous to common law. No principle is better settled than the principle that there

is no common law crime against the United States Government. Each crime must be covered by a specific criminal statute. 11 Am. Juris. p. 158.

If there were such a crime as a violation of the Law of War and if the same was correctly charged against the petitioners, it is apparent that the first charge does no more than to include offenses of sabotage and espionage which are specifically covered by 50 U. S. Code, Section 31–42, and Section 101–106 which is triable by the civil courts. There also arises here again the objection that the petitioners committed no acts in the zone of active military operations.

D. Conspiracy

Of course, the charge of conspiracy cannot stand if the other charges fall. We further call attention to the fact that there is an express statute, 18 U. S. Code 88, dealing with the criminal offense of conspiracy. We submit that this charge is not triable by a military commission.

E. Conclusion

In connection with all the charges we find that the conduct of the petitioners as shown by the evidence is nothing more than preparation to commit the crime of sabotage. (Even the charges themselves so indicate by use of the word "preparing".) There was no overt act. In fact, the objects of sabotage had never been specifically selected and the plan of the parties did not

contemplate any act of sabotage within a period of three months. These facts are not even sufficient to constitute an attempt to commit sabotage.

Furthermore, as pointed out above, none of the alleged criminal acts of the petitioners were committed in the zone of military operations. The civil courts are functioning both in the localities in which the offenses were charged to have been committed and in the District of Columbia where the alleged offenses are being tried. In these localities there is no martial law and no other facts which would justify action by a military tribunal.

It might be suggested that the Supreme Court cannot go into questions of fact even where such questions determine the jurisdiction of the Military Commission, and that the Military Commission must itself determine these facts subject to the right of review. The first answer to this is that where, as in this case, it clearly appears that the jurisdictional facts do not exist, the Supreme Court can consider this matter in determining the question of jurisdiction. There is a further answer in this case, because there is here no real right of review and, therefore, the only way in which the petitioners as a practical matter can raise this jurisdictional question is by Writ of Habeas Corpus.

We contend that, for the reasons above stated, a Military Commission cannot properly be ap-

pointed or act to try the charges and specifications filed against these petitioners.

IV

JURISDICTION OF MILITARY COMMISSION OVER PERSONS OF PETITIONERS

Article of War 2 defines the persons who are subject to military law and includes therein members of the armed forces and other designated persons. These cannot conceivably include the petitioners herein. Military courts-martial and other military tribunals have no jurisdiction to try any other person for offenses in violation of the Articles of War except in the cases of Articles 81 and 82. It is possible that other classes of persons may be triable by military tribunals for violations of the Laws of War, not included in the Articles of War.

As set out under Section III of this brief, the only Constitutional construction of Articles 81 and 82 is that military tribunals can have no jurisdiction over any other classes of persons (except those specified in Article of War 2), unless they are committing prohibited acts in some zone of active military operations. The same is necessarily true of any alleged violations of the Laws of War.

Ex Parte Milligan, 4 Wall. 2.

31, Opinions of the Attorney General, 356.

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In the above cited opinion of the Attorney General, at page 361, it is stated:

> "However, if there were no Milligan case to furnish us with an authoritative precedent, the provisions of the Constitution would themselves plainly bring us to the same conclusions as those set forth in the opinion of the court in that case, namely, that in this country, military tribunals, whether courts-martial or military commissions, cannot constitutionally be granted jurisdiction to try persons charged with acts or offences committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces such as camp followers. Were this not the correct conclusion, then any person accused of espionage, for instance, wherever apprehended and wherever the act charged may have been committed, would immediately become subject to the jurisdiction of a military court, and all the above-cited provisions of the Constitution would be rendered nugatory in the cases of the most grave class of crimes, generally carrying the death penalty. Any other conclusion would be tantamount to applying martial law, where no justification for martial law exists and none had been declared, and would be a suspension of the Constitution during war times."

Civil persons who commit acts in other localities than the zone of active military operations are triable only in the civil courts and under the criminal statutes of the United States. These statutes have been previously cited.

In the instant case, the petitioners landed from a submarine in Florida or on Long Island. At the point where they landed, no military engagement or combat of any kind was in progress. While it is true that the territory along the coast was patrolled by the Coast Guard, the patrol was unarmed. It would be a strained use of language to say that this patrol made the beach a military line or part of the zone of active operations.

Nor is the situation changed by the fact that on the Long Island Beach some distance away was located a Signal Corps platoon engaged in operating a radio locator station. The evidence shows that this platoon did not patrol the beach and was not engaged in any military offensive or defensive operation at the time the petitioners landed.

The prosecution may contend that the petitioners were in the zone of military operations because the location was within the Eastern Defense Command. However, it appears that the whole United States is divided into defense areas or sectors and that the orders therefor are substantially similar to those providing for the southern and eastern defense sectors. If the prosecution were correct

in its contention that the issuance of orders for these sectors creates a zone of active military operations, then the entire United States is a zone of active military operations and persons located therein are subject to the jurisdiction of military tribunals. Such cannot be the case.

The stipulation between the parties sets out the full data relative to the character of the territory where the alleged offenses were committed.

We call particular attention to the fact that prior to March 18, 1942, the Eastern Seaboard was designated as the "Eastern Theatre of Operations," and that on said date it was changed from "Eastern Theatre of Operations" to "Eastern Defense Command." It appears from the evidence that the reason for this change was the character of the area with reference to military supply functions which was such that it could not properly be considered as a "Theatre of Operations" as defined in Paragraph 4, FM 100–5 (1941). This change is still in effect. Here is a clear declaration by military authorities that the Florida and Long Island seacoasts were not and are not in any true sense zones of active military operations, but are instead parts of the Zone of the Interior as defined in paragraph 5 of the above-mentioned Field Service Regulations.

We note a possible contention of the prosecution that a special rule applies to the petitioners because they were caught "in fresh pursuit." If this were indeed a fact, we do not believe it could

possibly confer upon a Military Commission jurisdiction it could not otherwise exercise. Nor would the facts themselves seem to show that the petitioners were apprehended "in fresh pursuit." The apprehension took place several days after their landing and in territory widely separated from the point of landing. The circumstances of apprehension are fully disclosed in the record.

Nor can the Commission be justified on the ground of Martial Law. Martial Law is a matter of fact and not a matter of Proclamation; and a Proclamation assuming to declare martial law is invalid unless the facts themselves support it. This has been expressly held in the case of State Governors; and we know of nothing to indicate that the same rule does not apply to the President of the United States.

See *Sterling* v. *Constantine*, 287 U. S. 378.

In the instant case it cannot well be contended that the effect of the President's Order and Proclamation is to create martial law in the entire eastern part of the United States. Neither the order nor the proclamation so indicate. In view of the facts, there would seem to be no adequate reason either of military necessity or otherwise for depriving any persons in the territory involved in the instant case of the benefit of constitutional provisions guaranteeing an ordinary and proper trial before a civil court, including not only the provisions of the fifth

amendment but also the provisions of article III, sec. 2, clause 3, of the Constitution and the provisions of the sixth amendment. 12 Cal. L. Rev. (1924), 75, 178. Nor do the facts themselves in the instant case justify martial law in the territory in question. Attention is called to the fact that trial by a military commission in Indiana was found to be unlawful in the case of *Ex Parte Milligan,* 4 Wall. 2, even though Indiana had been actually invaded at the time.

There would then seem to be no reason for depriving any persons in the territory involved the benefit of the Constitutional provisions guaranteeing an ordinary and proper trial before a civil court. Such Constitutional provisions include not only the provisions of the Fifth Amendment but also the provisions of article III, sec. 2, subsection 3, and the provisions of the Sixth Amendment.

V

INVALIDITY OF PROCLAMATION

On July 2, the same day of the Presidential Order, the President issued a Proclamation (Exhibit B), the effect of which is to deny the right to enter civil courts to "citizens or residents of any nation at war with the United States or persons who give obedience to or act under direction of any such nation and who during time of war enter or attempt to enter the United States through coastal or boundary defenses and are

charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war." The Proclamation declares that such persons are subject to the jurisdiction of military tribunals.

The prosecution contends that this Proclamation applies to the petitioners; and the petitioners can not deny that the language has a startling similarity to the charges and specifications made against the petitioners and served upon them on the following day. Nor can the petitioners deny that this Proclamation was issued at the same time as was the Order appointing the Military Commission.

This Proclamation, if valid, affects the right to maintain this action, and also to some extent may affect the validity of the Military Commission.

We contend that the President had no authority to issue such Proclamation in the absence of a statute giving him this authority. We know of no inherent or Constitutional right of the President to issue Proclamations in matters affecting such substantial rights as this Proclamation purports to affect. We call attention to the fact that in England the practice has been for Parliament to authorize action similar to that embodied in the President's Proclamation.

4 and 5 George V, c. 29,
5 and 6 George V, c. 8,
10 and 11 George V, c. 55,
2 and 3 George VI, (1939) c. 62.

We have already pointed out the Constitutional difficulties of this Proclamation so far as it affects the creation of a Military Commission and have cited *Ex Parte Milligan* in connection therewith. We have also discussed the Proclamation so far as it affects the Writ of Habeas Corpus. We call further attention to the fact that the Constitutional right to suspend the Writ of Habeas Corpus is included in the Article and Section of the Constitution dealing with the powers of Congress. It is well settled that only Congress can suspend the Writ and then only in cases of rebellion or invasion.

Constitution, Art. 1, Sec. 9, Cl. 2,
Ex Parte Merryman, 17 Fed. Cas. 114 (Opinion by Justice Taney),
Ex Parte Bollman, 4 Cranch 101,
McCall v. *McDowell,* Fed. Cas. No. 8673,
Ex Parte Benedict, 3 Fed. Cas. No. 1292,
Willoughby, Constitutional Law, Sec. 1057.

Furthermore, as to these petitioners, the Proclamation was issued after the commission of the acts which are charged as crimes against them; and the Proclamation is, therefore, ex post facto as to them. The Proclamation would affect the petitioners in a serious and substantial manner. Without the Proclamation and under the applicable criminal statutes, the maximum penalty for sabotage in time of war could not exceed 30 years, and in case of espionage the death penalty

is not mandatory. On the other hand, for the alleged military offenses, upon which the Commission is seeking to try the petitioners, the maximum penalties sought by the prosecution are death in each case with a mandatory death sentence in the case of spying.

Attention is here called to the fact that the Congressional statutes for sabotage and espionage make a definite distinction in penalties depending upon whether the crime is committed in time of war or in time of peace. This indicates clearly that Congress was specifically legislating for acts committed under the condition in which the Nation finds itself today and did not contemplate trial thereof by a Military Commission.

We do not believe that Congress itself on July 2 (after the alleged commission of crime) could have passed valid legislation containing the provisions of the Proclamation and increasing the penalty for acts already committed.

> Constitution, Art. 1, Sec. 9, Cl. 3, *Thompson* v. *Utah,* 170 U. S. 343; *Burgess* v. *Salmon,* 97 U. S. 384.

Nor could Congress at that time have authorized such Proclamation by the President. *A fortiori* the President had no right to issue the Proclamation without statutory authority.

Another unusual feature of the Proclamation is that exception could be made thereto only under regulations of the Attorney General approved by

the Secretary of War. The President's Order of July 2 appointed the Attorney General to join with the Judge Advocate General in the prosecution of these petitioners; and the Order appointing the Military Commission was contemporaneous with the action of the Secretary of War in taking these petitioners from civil custody and ordering their delivery for trial before a Military Commission.

For all the above reasons, we submit that the President's Proclamation of July 2 is totally invalid and unconstitutional. We submit that it is in express violation of the Fifth and Sixth Amendments to the Constitution, of Article III, Section 2, Clause 3 of the Constitution and of Article I, Section 9, Clause 2 of the Constitution.

VI

PROVISIONS OF PRESIDENTIAL ORDER IN CONFLICT WITH EXPRESS STATUTES

If we could assume that a Military Commission had jurisdiction over the person of the petitioners and had jurisdiction to try the charges and specifications against the petitioners, the Order of the President would, in our opinion, still be invalid because it violates in certain specific particulars express acts of Congress as embodied in the Articles of War.

Article of War 38 expressly provides in part as follows:

> "The President may, by regulations, which he may modify from time to time, pre-

scribe the procedure, including modes of proof, in cases before courts martial, courts of inquiry, *military commissions*, and other military tribunals, which regulations *shall, insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed.*" (Italics supplied.)

It will be noted that the President is given authority by regulation to modify from time to time procedure and modes of proof before military commissions but that this authority is circumscribed in two ways:

(1) The regulations shall, so far as he shall deem practicable, apply the rules of evidence of United States District Courts.

(2) The regulations shall prescribe nothing contrary to or inconsistent with the Articles of War.

The President's order in providing for admission of such evidence "as would, in the opinion of the President of the Commission, have probative value to a reasonable man" radically departs from the rules of evidence of the United States district courts and assumes to leave the admission of testimony to the unlimited discretion of the President of the Commission, irrespective of the opinions of the other members of the commission.

The order does not recite or indicate any reason of practicability requiring this radical departure. We believe that this provision in the Presidential order is a violation of both the letter and spirit of Article of War 38 and that, since it goes to the very heart of the case, it renders the entire order invalid. This is especially true in view of the practical application which has been given to the mode of proof indicated in the President's order. This feature of the matter is later called to the attention of the court in more detail.

However, it is not necessary even to resort to construction to show that the order expressly violates the other provision of Article of War 38 to the effect that no regulations shall be inconsistent with the Articles of War.

In the first place, Article of War 43 contains the following express provision:

> "ART. 43, DEATH SENTENCE—WHEN LAWFUL.—No person shall, by general court martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths

of all of the members present at the time the vote is taken."

Article 82 provides a mandatory death penalty; and for a violation of Article 81 a death sentence or an unlimited period of imprisonment can be imposed. The prosecution is contending that the death penalty also applies to the charge for violation of the Law of War and for the conspiracy charge; and, if there are any such offenses, the penalty is certainly in excess of ten years.

Notwithstanding this fact, the Presidential Order expressly provides that the concurrence of only two-thirds of the members of the Commission shall be necessary for a conviction or sentence. This is a very material variation from the express provisions of Article 43, which requires a unanimous vote for the death penalty.

If it be urged that the Commission has not yet acted and that their decision might possibly be unanimous or by a three-fourths vote, the answer is that this would not cure the defect in the Order or the denial of rights of the petitioners incident thereto. For it would be impossible to determine how much the decision was affected as a practical matter by the knowledge on the part of the Commission that only a two-thirds vote was actually necessary for conviction.

Another serious practical difficulty is presented in this connection. The Commission has ruled

that no announcement will be made in Court and no information given to the petitioners or their counsel as to the findings or sentence or any other action of the Commission. The Commission has stated that its findings and sentence will be transmitted directly and secretly to the President for final action. There is no requirement that the President either delay action or delay the imposition or execution of any sentence against these petitioners or give prior notice thereof to these petitioners.

This fact would make it impossible for the petitioners to determine either what the vote of the Commission was on any charge or specification against any petitioner or to take any timely action based upon a vote contrary to the provisions of Article of War 43. Hence petitioners' rights in this respect must be protected now, if at all.

Article of War 70 provides in part as follows:

> "No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf,

either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

"Before directing the trial of any charge by general court martial the appointing authority will refer it to his staff Judge Advocate for consideration and advice."

The full meaning of this provision is discussed in paragraphs 30 and 35 of the Court Martial Manual; but even without the aid of this manual the meaning of Article 70 is entirely clear. The procedure of investigation provided therefor is analogous to consideration by a grand jury or committing officer in connection with charges in a district court. In fact, the defendant is given, by Article 70, a right of cross-examination which would not exist in the case of an indictment in the civil courts.

The President's order expressly dispenses with this right of an accused, by summarily ordering the petitioners to trial before a military commission. As shown by stipulation in the record, there has, in fact, been no such investigation as is prescribed by Article 70.

This is a substantial deprivation of rights afforded the accused under the Articles of War. A trial without such investigation is just as invalid as would be a trial in the district court

without either commitment, presentment, or indictment. Such a trial, of course, would be absolutely void.

Article of War 46 is as follows:

> "ART. 46. ACTION BY CONVENING AUTHORITY.—Under such regulations as may be prescribed by the President every record of trial by general court martial or military commission received by a reviewing or confirming authority shall be referred by him before he acts thereon, to his staff judge advocate or to the Judge Advocate General. No sentence of a court martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being."

Article of War 50½ provides in part as follows:

> "ART. 50½. REVIEW: REHEARING.—The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department.
>
> "Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of Article 46, Article 48, or Article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion in writing to the Judge Advocate General who shall, except as

herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

"Except as herein provided, no authority shall order the execution of any other sentence of a general court martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence."

Article of War 50½ contains other detailed provisions as to review of findings and sentences.

Articles 46 and 50½ must be read together. In fact, Article 50½ expressly refers to Article 46. When so read together a complete system of review is provided for the action of the military court. Article 46 is made expressly applicable to a Military Commission, and, by reference to Article 46, Article 50½ is made applicable to a Military Commission.

The method of review so provided requires among other things a Board of Review, constituted by the Judge Advocate General in his office, and requires that such board shall submit its opinion to the Judge Advocate General who shall transmit the same to the President with the recommendations of the Judge Advocate General.

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Article 50½ further provides that neither a death sentence nor a sentence of confinement in a penitentiary shall become effective until the Board of Review, with the approval of the Judge Advocate General, has held that the record of trial is legally sufficient to support the sentence.

In contrast with these statutory provisions the President's order provides that "the record of the trial, including any judgment or sentence, shall be transmitted directly to me for my action thereon." This is an express violation of the statutory provisions of Articles of War 46 and 50½.

It may be contended that the President is not prevented by his Order from following the method of review prescribed by Articles 46 and 50½ if he so elects. However, at most the Presidential order would leave some method of review to the discretion of the President, when under the provisions of Articles 46 and 50½ the petitioners are entitled to a specific method of review as a matter of right and not as a matter of discretion. An even more complete answer is that Article of War 50½ requires the action by the Board of Review and the recommendation of the Judge Advocate General before the case is ever submitted to the President, while the Order provides for the Commission to transmit the record of the trial, including any judgment or sentence, *directly* to the President for his action thereon.

(We again call attention to the fact that the petitioners are not to be advised of the result of any of the proceedings as to conviction or sentence until the final action of the President.)

Furthermore, the President's Order has made it impossible to comply with these statutory provisions by directing the Judge Advocate General (and the Attorney General) to conduct the prosecution, thereby disqualifying the Judge Advocate General and his subordinates from acting as a reviewing authority. The proceedings disclose that the Judge Advocate General has in fact assisted in the conduct of the prosecution.

It can hardly be contended that this is not a material violation of the statutory rights afforded accused persons by the Articles of War. The provisions of Article 46 and 50½ are the methods of appeal of a person tried before a Military Commission. The President's Order deprives them of this method of appeal.

In discussions before the alleged Military Commission the prosecution suggested that in Article 38 the proviso that the rules should prescribe "nothing contrary to or inconsistent with these Articles" did not mean to refer to Articles of War prescribing the procedure for Courts-Martial. This interpretation would not only be directly contrary to the language of Article 38, but would

also leave the proviso meaningless so far as Military Commissions are concerned—and this in spite of the fact that Military Commissions are expressly mentioned in the same sentence in which the proviso occurs.

Of course, Article 46 and Article 50½ (the latter of which Articles refers to the former) specifically provide a procedure for Military Commissions; and the argument suggested above would not be applicable to the requirements of review prescribed in said Articles 46 and 50½. The direct violation of the provisions of these Articles has already been called to the Court's attention.

It will be noted that Articles 46 and 50½ do not require the aid of Article 38 for their interpretation. It will also be noted that every other provision of the Articles of War relating to procedure refers to the procedure of Courts Martial. Therefore, unless the proviso of Article 38 is intended to refer to the Articles prescribing procedure for Courts Martial, the proviso would have no meaning and application at all.

There is no reason for a construction which produces such an absurd result and which makes the language of the proviso meaningless. This is particularly true where the language of the Proviso and Article 38 in its entirety is perfectly clear. The applicability of Article 38 was recognized in the Presidential Order which referred to rules "consistent with the powers of Military Commissions under the Articles of War." *In fact, the*

President bases his alleged authority on the Constitution and Statutes "and more particularly the Thirty-Eighth Article of War." [Italics supplied.] Apparently the prosecution also thought Article 38 applicable by suggesting that the Attorney General be considered as a trial Judge Advocate.

But in any event it is entirely clear that a cardinal purpose of Article 38 was to provide a procedure for Military Commissions, and that a part of that procedure is the proviso that nothing in the procedure shall be "contrary to or inconsistent with these Articles" (meaning the Articles of War).

We have pointed out the sharp inconsistency between the President's Order and the procedure prescribed in the Articles of War. We submit that these direct conflicts with express Congressional statutes render the President's Order illegal and invalid.

VII

DELEGATION OF RULE-MAKING POWER TO COMMISSION

As stated above, Article 38 provides that the President may by regulation prescribe the procedure for Military Commissions (subject to the limitations which we have previously mentioned). There is no provision that he can delegate to anyone else the right to prescribe such rules.

Notwithstanding this fact, the President in his Order provides: "The Commission shall have power and shall, if the occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it."

In other words, the President, instead of prescribing the procedure for the Military Commission, has, in this case, purported to delegate to the Commission itself the right to prescribe such procedure. The situation is not altered by the provision in the Order that the procedure shall be "consistent with the power of Military Commissions under the Articles of War." For the President's own right to prescribe procedure would be subject to the same limitation. The Order still delegates powers which the Statute vests in the President; and as hereinafter set forth, the Commission has acted under this delegation of powers.

The President's Order does not even require the rules to be prescribed before the hearing begins, but apparently authorizes rules to be made from time to time "as occasion requires." The Commission has in fact made most of its rules as the case progressed. It is difficult to distinguish between rules made in this manner and no rules at all.

It seems manifest to us that this broad delegation of power sought to be given in violation of well

established legal principles, makes the Order invalid and renders void all procedures before the Commission.

VIII

RULES MADE BY THE COMMISSION

Articles of War 18 provides in part: "Each side shall be entitled to one peremptory challenge." At the beginning of the hearing before the Commission, the petitioners sought to exercise this right to peremptory challenge and to challenge one member of the Commission.

The Commission, assuming to act in accordance with the President's Order of July 2, denied this right of challenge. This is in express violation of the statutory enactment of Article of War 38, because the Commission prescribed a procedure "contrary to" and "inconsistent with" Article 18.

Furthermore, assuming to apply the standard of "probative value to a reasonable man," sought to be delegated to the President of the Commission by the Order of July 2, 1942, the Commission admitted as against other defendants, the confessions of each defendant, although each such confession was made after the apprehension of the person confessing and after his alleged participation in the conspiracy had ended and after his action in furtherance thereof had ceased. None of these confessions were made in the presence of the other defendants.

Not only were these confessions admitted on the charge of conspiracy, but they were also admitted on the other charges and specifications. These confessions were used to prove material facts in making out a case against the petitioners.

We believe that these rules on procedure are invalid and that the first of them is in express violation of Articles of War 18 and 38.

If it be suggested that these are matters which do not affect the jurisdiction of the Commission or the validity of the proceedings, but are merely questions which may be raised on appeal or review, the answer is that the President's Order has deprived the petitioners of such appeal or review, as previously pointed out to the Court.

(On this entire question of rules of procedure it is interesting to note from 55 Harvard Law Review, p. 1295–6, that apparently the rules used by the Military Commission here were a much greater departure from the ordinary procedure of Courts-Martial than were the rules of the Military Commission in Hawaii immediately following Pearl Harbor, when there was a critical emergency and a specific declaration of martial law.)

These rules of procedure in the instant case, adopted in reliance on the President's Order, again show the invalidity of this Order because of its violation of express statutory provisions.

IX

EX PARTE MILLIGAN AND OTHER CASES

The leading decision on the matters in controversy in this procedure is the case of Ex Parte Milligan, 4 Wallace 2. The case was decided in 1866, and it has been cited on numerous occasions and discussed by text writters and in law review articles for many years. It has never been overruled.

55 Harvard Law Review (1942) 1295.

In that case Milligan was charged during the Civil War with giving aid and comfort to the enemy, communicating with the enemy, engaging in other similar practices and violating the Laws of War. He was arrested, tried and sentenced by a Military Commission. The President had issued a Proclamation suspending the writ of habeas corpus; and the Military Court was appointed by the General commanding the District pursuant to authority given him by the President. Milligan filed a petition for a writ of habeas corpus for his release. There was a unanimous decision in favor of his release but there was a divergence in views among the members of the Court. Five members joined in the majority opinion and four in a separate concurring opinion. The majority

opinion held not only that the President did not have authority to issue his Proclamation or to provide for a trial by a Military Commission, but also that even Congress did not have such authority. The minority opinion conceded the authority of Congress, but held that Congress had not exercised its authority in this case and that the President was not authorized in acting without the authority of Congress.

However, the nine Judges agreed on certain principles which, it seems to us, are determinative of the present case. In particular they held that a Military Commission is without jurisdiction to try a person not a member of our armed forces under the Laws of War in a military district in which the civil courts were functioning and in which there is no insurrection or rebellion, unless (as the minority held) Congress has enacted legislation conferring such jurisdictional power.

They further held that the power to declare martial law and supersede the judicial process can be authorized only by Congress and then only in times of actual and existing insurrection or invasion within districts or localities where ordinary law no longer protects public safety and private rights. They further held that the President of the United States did not possess any power to prescribe a trial by a Military Commission in districts or localities where the civil courts were adequately functioning.

The pertinent language of the majority opinion includes the following:

At page 121:

> "Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of this country was conferred on them; because the Constitution expressly vests it "in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and established by Congress. *They can not justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction."* [Italics supplied.]

And at page 127:

> * * * Martial Law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. * * * [Italics supplied.]

And again at page 127:

> "It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are ac-

tually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."

Pertinent parts of the minority opinion contain in part the following language:

At page 141:

"* * * What we have already said sufficiently indicates or opinion that there is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution. And wherever our army or navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress.

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be

exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times or insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be de-

rived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces."

The minority seems to have stated its extreme position on pages 136 and 140, as follows:

"We agree in the proposition that no department of the government of the United States—neither President, nor Congress, nor the Courts—possesses any power not given by the Constitution.

We assent, fully, to all that is said, in the opinion, of the inestimable value of the trial by jury, and of the other constitutional safeguards of civil liberty. And we concur, also, in what is said of the writ of habeas corpus, and of its suspension, with two reservations: (1) That, in our judgment, when the writ is suspended, the Executive is authorized to arrest as well as to detain; and (2) that there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention.

We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana. * * *

We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.

Where peace exists the laws of peace must prevail. What we do maintain is, that when

> the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety."

It appears, therefore, that the entire Court in *Ex Parte Milligan* enunciated principles which fully support the position which the petitioners are taking in this case.

In spite of the criticism of some features of the decision in *Ex Parte Milligan* the great weight of judicial and professional opinion supports the case, at least as far as the minority opinion goes, which is sufficient for our purposes in this proceeding. Attorney General Gregory in 31 Opinions of Attorney General, at page 361, says:

> The Milligan decision has been the subject of extensive discussion and attack, and the contention has been made that the discussion of the constitutional questions was not essential to the decision and therefore merely dicta. However, if there were no Milligan case to furnish us with an authoritative precedent, the provisions of the Constitution would themselves plainly bring us to the same conclusions as those set forth in the opinion of the court in that case, namely, that in this country, military tribunals, whether courts martial or military commis-

sions, can not constitutionally be granted jurisdiction to try persons charged with acts or offenses committed outside of the field of military operations, or territory under martial law or other peculiarly military authority except members of the military or naval forces or those immediately attached to the forces such as camp followers. Were this not the correct conclusion, then any person accused of espionage, for instance, wherever apprehended and wherever the act charged may have been committed, would immediately become subject to the jurisdiction of a military court, and all the above-cited provisions of the Constitution would be rendered nugatory in the cases of the most grave class of crimes, generally carrying the death penalty. Any other conclusion would be tantamount to applying martial law, where no justification for martial law exists and none had been declared, and would be a suspension of the Constitution during wartimes.

Other decisions following or citing with approval the *Milligan* case, are—

Sterling v. *Constantin,* 287 U. S. 378.
Caldwell v. *Parker,* 252 U. S. 376.
Kahn v. *Anderson,* 255 U. S. 1.
Home Building & Loan Assn. v. *Blaisdell,* 290 U. S. 398.
Carter v. *Carter Coal Co.,* 298 U. S. 330.

It is our view that the majority opinion in the *Milligan* case is still the law and the Constitu-

tional protections provided therein still govern the trial of persons in this country. We contend that even Congress could not authorize a Military Commission in the instant case. However, it would not seem necessary for the Court to decide this question; for Congress has not in fact acted.

It seems to us clear that the President had no right to create this Commission without Congressional authority and, of course, had no right to give a Commission powers which are in express violation of Congressional enactment.

If there is a feeling that the penalties for wartime sabotage and espionage are not severe enough, Congress can, of course, promptly remedy this situation as to future cases. Therefore, a decision in favor of the petitioners here could leave no inference with our enemies or others that persons guilty of sabotage or espionage would in the future incur less than the most severe penalty.

X

CONCLUSION

May we respectfully suggest that the instant case presents a real test of our Democratic form of Government and its judicial system. It is trite but still true to say that the soundness of any system of government proves itself in the hard cases where there is an element of public clamor. Such circumstances test the real ability of a gov-

ernment and its judicial system to protect the rights of an unpopular minority.

Respectfully submitted.

CASSIUS M. DOWELL,
Colonel, United States Army,
KENNETH C. ROYALL,
Colonel, Army of the United States,
Attorneys for Petitioners.

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION

Article 1, Section 8.

> The Congress shall have Power * * *
> To make Rules for the Government, and Regulation of the land and naval Forces * * *

Article III, Section 2, Clause 3:

> The trial of all crimes, except cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such Place or Places as the Congress may by law have directed.

Article I, Section 8, Clause 14:

> To make Rules for the Government of the land and naval Forces.

Amendment 5:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy

of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATUTES

THE ARTICLES OF WAR

(Title 10 U. S. C. § 1471–1593a)

Articles of War 2:

ART. 2. Persons subject to Military Law—The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law", or "persons subject to military law", whenever used in these Articles: *Provided,* That nothing contained in this act, except as specifically provided in article 2, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction unless otherwise specifically provided by law.

(a) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same;

(b) Cadets;

(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: Provided, That an officer or soldier of the Marine Corps when so detached may be tried by military court martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court martial after such detachment ceases;

(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

(e) All persons under sentence adjudged by courts martial;

(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia.

Article 18 (§ 1489):

Members of a general or special court martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time. Challenges by the trial judge advocate shall ordinarily be presented and decided before those by the accused are offered. Each side shall be entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 790.)

Article 38 (§ 1509):

The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided,* That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further,* That all rules made in pursuance of this article shall be laid before the Congress annually. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 794.)

Article 43 (§ 1514):

No person shall, by general court martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said

court martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 795.)

Article 46 (§ 1517):

Under such regulations as may be prescribed by the President every record of trial by general court martial or military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General. No sentence of a court martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being. (June 4, 1920, ch. 227, subch. II, § I, 41 Stat. 796.)

Article 50½ (§ 1522): Article 50½ is too long to justify quotation herein. It may be found at Title 50 U. S. C. § 1522.

Article 70 (§ 1542): Article 70 is too long to justify quotation herein. It may be found at Title 50 U. S. C. § 1542.

Article 81 (§ 1553):

Whosoever relieves or attempts to relieve the enemy with arms, ammunition,

supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court martial or military commission may direct. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 804.)

Article 82 (§ 1554):

Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court martial or by a military commission, and shall on conviction thereof, suffer death. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 804.)

(Title 8, U. S. C., sec. 801)

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: * * *

* * * * *

(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; or

(e) Voting in a political election in a foreign state or participating in an elec-

tion or plebiscite to determine the sovereignty over foreign territory; or

(f) Making a formal renunication of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(g) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial; or

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction. (Oct. 14, 1940, c. 876, title I, Subch. IV, sec. 401, 54 Stat. 1168.)

18 U. S. Code, Sec. 1:

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.

18 U. S. Code, Sec. 88:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000 or imprisoned not more than two years, or both.

50 U. S. Code, Ch. IV:

These statutes are too lengthy to print in this appendix. Reference is therefore made to the U. S. Code for its provisions.

50 U. S. C. § 21:

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety. (R. S. § 4067; Apr. 16, 1918, ch. 55, 40 Stat. 531.)

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